**4.9 Civil Rights Act – 42 U.S.C. § 1981 – Race Discrimination**

**in Employment – Discharge or Failure to Promote**

In this case, [name of plaintiff] claims that [name of defendant] violated the Federal Civil Rights statutes that prohibit employers from discriminating against an employee in the terms and conditions of employment because of the employee’s race.

Specifically, [name of plaintiff] claims that [name of defendant] [describe adverse employment action] [him/her] because of [his/her] race.

[Name of defendant] denies [name of plaintiff]’s claims and asserts that [describe the defendant’s defense].

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of defendant] [describe adverse employment action]; and

Second: [Name of plaintiff]’s race was a motivating factor that prompted [name of defendant] to take that action.

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

If you find that [name of defendant] [describe adverse employment action], you must decide whether [name of plaintiff]’s race was a “motivating factor” in the decision.

To prove that race was a motivating factor in [name of defendant]’s decision, [name of plaintiff] does not have to prove that [his/her] race was the only reason that [name of defendant] [describe adverse employment action]. It is enough if [name of plaintiff] proves that race influenced the decision. If [name of plaintiff]’s race made a difference in [name of defendant]’s decision, you may find that it was a motivating factor in the decision.

[Name of defendant] claims that [name of plaintiff]’s race was not a motivating factor in the decision and that [he/she] [describe adverse employment action] for [another reason/other reasons]. An employer may not discriminate against an employee because of the employee’s race, but the employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]’s reason[s] for the decision [to discharge/not to promote] [name of plaintiff], and you find that [name of defendant]’s decision was not motivated by [name of plaintiff]’s race, you must not second guess [name of defendant]’s decision, and you must not substitute your own judgment for [name of defendant]’s judgment – even if you disagree with it.

[**Pretext (optional, see annotations):** As I have explained, [name of plaintiff] has the burden to prove that [his/her] race was a motivating factor in [name of defendant]’s decision to [describe adverse employment action]. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of plaintiff]’s race was a motivating factor in [name of defendant]’s decision to [describe adverse employment action], you may consider the circumstances of [name of defendant]’s decision. For example, you may consider whether you believe the reason[s] [name of defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reasons for the decision.]

[**Including Affirmative Defense (if applicable, see annotations):** If you find in [name of plaintiff]’s favor for each fact [he/she] must prove, you must decide whether [name of defendant] has shown by a preponderance of the evidence that [he/she/it] would have [describe adverse employment action] even if [name of defendant] had not taken [name of plaintiff]’s race into account. If you find that [name of plaintiff] would have been [describe adverse employment action] for reasons other than [his/her] race, you must make that finding in your verdict.

If you find for [name of plaintiff] and against [name of defendant] on this defense, you must consider [name of plaintiff]’s compensatory damages.]

[**Without Affirmative Defense:** If you find in [name of plaintiff]’s favor for each fact [he/she] must prove, you must consider [name of plaintiff]’s compensatory damages.]

When considering the issue of [name of plaintiff]’s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]’s damages as a result of [describe adverse employment action], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) net lost wages and benefits from the date of [describe adverse employment action] to the date of your verdict; and

(b) emotional pain and mental anguish.

To determine the amount of [name of plaintiff]’s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury – tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You will determine what amount fairly compensates [him/her] for [his/her] claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages:** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to “mitigate” those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that work comparable to the position [name of plaintiff] held with [name of defendant] was available, and [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]’s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Punitive Damages:** [Name of plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [name of plaintiff] but, instead, to punish [name of defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [name of plaintiff] and award [him] [her] compensatory damages.

To be entitled to an award of punitive damages [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] acted with either malice or with reckless indifference toward [name of plaintiff]’s federally protected rights. Specifically, [name of plaintiff] must show that an employee of [name of defendant], acting in a managerial capacity, either acted with malice or with reckless indifference to [name of plaintiff]’s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a “managerial capacity” based upon the type of authority [name of defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [name of defendant] acted with malice, [name of plaintiff] must show that an employee acting in a managerial capacity knew that federal law prohibits discrimination and discriminated against [name of plaintiff] anyway. To show that [name of defendant] acted with reckless indifference to [name of plaintiff]’s federally protected rights, [name of plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle [name of plaintiff] to an award of punitive damages; [name of plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees’ acts are contrary to the employer’s good faith efforts to comply with the law by implementing policies and programs designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [name of defendant] acted with malice or with reckless indifference to [name of plaintiff]’s federally protected rights. In determining whether to award punitive damages, you may consider factors such as: [ whether [name of defendant] engaged in a pattern of discrimination toward its employees]; [ whether [name of defendant] acted spitefully or malevolently]; [ whether [name of defendant] showed a blatant disregard for civil legal obligations]; [ whether [name of defendant] failed to investigate reports of discrimination]; [ whether [name of defendant] failed to take corrective action concerning discriminatory acts or comments by its employees]; and [ whether the person accused of discrimination was included in the employer’s decision making process concerning [name of plaintiff]’s [discharge] [denied promotion].]

If you find that punitive damages should be assessed against [name of defendant], you may consider the evidence regarding [name of defendant]’s financial resources in fixing the amount of such damages.]

**Special Interrogatories To The Jury**

**Do you find from a preponderance of the evidence:**

That [name of defendant] [describe adverse employment action]?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

That [name of plaintiff]’s race was a motivating factor that prompted [name of defendant] to take that action?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

[ That [name of defendant] would have [describe adverse employment action] even if [name of defendant] had not taken [name of plaintiff]’s race into account.?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.]

That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “Yes,”

in what amount? $\_\_\_\_\_\_\_\_\_\_\_\_\_

That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “Yes,”

in what amount? $\_\_\_\_\_\_\_\_\_\_\_\_\_

[If you did not award damages in response to either Question Nos. 4 or 5, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you awarded damages in response to Question Nos. 4 or 5 (or both), go to the next question.]

[ That punitive damages should be assessed against [name of defendant]?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “Yes,”

in what amount? $\_\_\_\_\_\_\_\_\_\_\_\_\_

So Say We All.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Foreperson’s Signature

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_